Office - Supreme Court, U. S.
MAR 23 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945

No. 990

H. REEVE ANGEL & CO., INC.,
Petitioner,

v.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Customs and Patent Appeals

FREDERICK W. BROOKS
Attorney for Petitioner

INDEX

	PAGE
Petition	1
Opinions Below	1
Jurisdiction	2
The Statutes	2
Statement	3
Question Presented	4
Reasons for Granting Writ	5
Conclusion	12
Appendix A	13-15
Appendix B	16-23

Cases Cited

Aetna Explosives Co. v. United States, 9 Ct. Cust. Appls. 298	11
Cadwalader v. Wanamaker, 149 U. S. 532	8
Chew Hing Lung v. Wise, 176 U. S. 156	8
Fink v. United States, 170 U. S. 584	8
Justinian Caire Co. v. United States, 20 Treasury Decisions 14, Abstract 24511	8
Kupfer Bros. Co. v. U. S., 7 Ct. Cust. Appeals 86	9
Magone v. Heller, 150 U. S. 70	8
Magone v. Wiederer, 159 U. S. 555	8
Proctor Co. v. United States, 6 Ct. Cust. Appeals 119-120	9
United States v. Aetna Explosives Co., 256 U. S. 402	10, 11
United States v. Fuld, 4 Ct. Cust. Appeals 234	11
United States v. W. X. Huber Co., 30 Ct. Cust. and Pat. Appls. 183	4

Statutes Cited

PAGE

Tariff Act of 1922
Sched. 1, Par. 31 (42 Stat. 863) 7

Tariff Act of 1930
Sched. 14, Par. 1402 (46 Stat. 653, U. S. C. Title 19, Sect. 1001) 7
Sched. 14, Par. 1409 (46 Stat. 657, U. S. C. Title 19, Sect. 1001) 8
Sched. 14, Par. 1413 (46 Stat. 657, U. S. C. Title 19, Sect. 1001) 2
Sched. 15, Par. 1529 (46 Stat. 665, U. S. C. Title 19, Sect. 1001) 7
Sched. 15, Par. 1552 (46 Stat. 671, U. S. C. Title 19, Sect. 1001) 7
Sect. 514 (46 Stat. 734, U. S. C. Title 19, Sect. 1514) 3

Act of June 12, 1934
(48 Stat. 943) 3, 13

Joint Resolution of Congress, approved March 1, 1937
(50 Stat. 24) 3, 13

Judicial Code
Section 195 (U. S. C. Title 28, Sect. 308) 2

Miscellaneous

Weekly Treasury Decisions C. D. 906, January 11, 1945, Volume 80, No. 2, page 22 1
Weekly Treasury Decisions C. A. D. 324, February 21, 1946, Volume 81, No. 8, page 36 1

Digests of Trade Data, Vol. V 5

IN THE

Supreme Court of the United States

October Term, 1945

H. REEVE ANGEL & CO., INC.,
Petitioner,

v.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Customs and Patent Appeals

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals in *United States* v. *H. Reeve Angel & Co., Inc.*, Customs Appeal No. 4508, entered January 7, 1946, reversing a judgment of the United States Customs Court rendered December 27, 1944.

Opinions Below

The opinion of the trial court (R. 25-36) is reported in C. D. 906, weekly "Treasury Decisions", January 11, 1945, Vol. 80, No. 2, p. 22. The opinion of the Court of Customs and Patent Appeals (R. 38-43) is reported as C. A. D. 324, weekly "Treasury Decisions", February 21, 1946, Vol. 81, No. 8, p. 36.

Jurisdiction

The judgment of the Court below was entered January 7, 1946 (R. 43). This petition is filed under the Rules of this Court pursuant to Section 195 of the Judicial Code as amended (U. S. C., Title 28, Sec. 308) providing that:

> "* * * in any case in which the judgment or decree of the Court of Customs and Patent Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court, upon the application of either party, duly made as required by Section 350 of this title, to require, by certiorari or otherwise, such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

The Statutes

Par. 1409. Filtering paper valued at 75 cents or more per pound, 2½ cents per pound and 7½ per centum ad valorem. (Trade Agreement with United Kingdom. Printed in Appendix.)

Par. 1413. Papers and paper board and pulpboard, including cardboard and leatherboard or compress leather, embossed, cut, die-cut, or stamped into designs or shapes, such as initials, monograms, lace, borders, bands, strips, or other forms, or cut or shaped for boxes or other articles, plain or printed, but not lithographed, and not specially provided for; * * * (Tariff Act of 1930; 46 Stat. 657, U. S. C. Title 19, Sect. 1001.)

The Trade Agreement with the United Kingdom is published as T. D. 49753, 74 Treasury Decisions 253, which is, in effect, a treaty negotiated by our Department of State with the representatives of the United Kingdom modifying and amending certain of the provisions of the

Tariff Act of 1930 and reducing certain of the duties therein provided on imported merchandise, in accordance with the Act of June 12, 1934 (48 Stat. 943) extended by joint resolution of Congress, approved March 1, 1937 (50 Stat. 24) for the express purpose of expanding our foreign trade. This Trade Agreement and Statute are printed in the Appendix hereto.

Statement

The Collector assessed duty at 30% under par. 1413, *supra,* and the importer filed protest under Section 514, Tariff Act 1930 (46 Stat. 734) claiming the merchandise dutiable at 2½ cents per pound and 7½ per centum ad valorem under the Trade Agreement with the United Kingdom, *supra,* which protest was transmitted to the Customs Court and became the pleading in the suit which is now before this Court (R. 4, 5).

The Customs Court sustained the following contentions of the plaintiff below: (a) the provision in the Trade Agreement is an *eo nomine* designation by use which prevails over a more general descriptive provision; (b) the doctrine of legislative approval of prior judicial construction applies, because in 1911, the Trial Court held similar merchandise dutiable as filtering paper and not as paper cut or stamped into designs or shapes under a similar provision in the Tariff Act of 1909; (c) long-continued Customs practice of classification of this merchandise as filtering paper under the Tariff Acts of 1913, 1922 and 1930 up to March, 1943 at the ports of New York and Chicago; (d) if filtering paper in circles is not dutiable under the *eo nomine* provision in the Trade Agreement, there would be practically no filtering paper dutiable thereunder; (e) if Congress intended that the provision in paragraph 1413 for papers cut into designs or shapes should reach out and invade other paragraphs in the Act,

it would have used more all-inclusive and more explicit language as it did in several other paragraphs of that Act in order to so express its intentions.

The Appellate Court reversed the Trial Court, saying it was conceded that the merchandise is filtering paper valued over 75 cents per pound and the sole question involved, is whether or not the provision for papers cut or stamped into designs or shapes is more specific than the provision of paragraph 1409 for filtering paper and holding that their former decision in *United States* v. *W. X. Huber Co.*, 30 C. C. P. A. 183, which involved tissue paper used for filtering coffee, was *stare decisis* of the issue, although that case did not involve the Trade Agreement with the United Kingdom as it arose before the effective date thereof. The *Huber* case, *supra,* reviewed the legislative history of the provision for papers cut or stamped into designs or shapes and held it more persuasive of the intent of Congress, than other rules of construction discussed in their opinion and in the opinion of the Trial Court. The Appellate Court held the doctrine of legislative approval of prior judicial determination did not apply because the provision judicially construed, was for "paper" cut to shape while the provision in the later Tariff Acts was for "papers" cut to shape and also that the record does not establish long-continued uniform practice in classification of the instant merchandise as the witnesses testified only as to their own experience at the ports of New York and Chicago and the Customs Examiner at New York testified only as to his advisory classification and not as to how the Collector assessed duty.

Question Presented

Is this filtering paper in circles dutiable under the *eo nomine use* designation as filtering paper valued at 75 cents or more per pound in the Trade Agreement with the United Kingdom or under the descriptive provision of

paragraph 1413, Tariff Act of 1930 as papers cut or stamped into designs or shapes?

Reasons for Granting Writ

1. The Trade Agreement with the United Kingdom is, in effect, a treaty for the purpose of expanding foreign trade which contains a specific provision for filtering paper valued at 75 cents or more per pound which was intended to include high grade chemical filter papers chiefly sold by the package, principally obtained from the United Kingdom and limited in value so as to be largely non-competitive with United States production, all of which appears in the official report by the United States Tariff Commission (1938) with respect to products on which concessions were granted by the United States in the said Trade Agreement.

In Volume V of Digests of Trade Data prepared by the United States Tariff Commission with respect to products on which concessions were granted by the United States in the said Trade Agreement with the United Kingdom at pages 14-45 and 14-46 the following information is set forth:

> United States imports
>
> Imports of filter paper range from the cheapest to the highest grade papers. Imports of papers which sell in the domestic market at from 20 to 40 cents per pound come largely from France; these are the so-called industrial papers. The United Kingdom is the principal supplier of high grade or quantitative papers (for quantitative analysis); these papers enjoy considerable prestige in the United States market due to their established reputation for quality and uniformity. High grade filter papers are sold chiefly by the package rather than the pound; on the basis of weight their selling price would be from $2. to $12. or more per pound, according to quality. Imports by principal sources are shown in table 3.

• • •

Competitive conditions

The United States market for high-grade filter papers is supplied almost entirely by imports. This is due to the fine, uniform quality of the imported paper over a long period of years and the disinclination of laboratory technicians to experiment with domestic paper.

The real competition in this country is in the grades of industrial papers produced domestically and imported. Practically all of the filter paper imported from France, Japan and Spain and a part of that imported from Germany and the United Kingdom is of grades competitive with those produced in general in this country. No reductions have been made on these papers. Concessions are limited to paper valued at 75 cents or more per pound, which is largely noncompetitive with United States production.

2. Filtering paper is not imported or used in rolls and although sometimes imported in sheets, it is always cut into circles before use (R. 10, 16). Therefore, since all sheets or circles are paper cut into designs, shapes or other forms, there is no filtering paper which can be classified under the Trade Agreement and the *eo nomine* provision therein, is nullified (R. 11).

If it be argued that sheets of filtering paper may not be dutiable as paper cut into forms, the testimony shows (R. 11) that 1/100 of 1% of filtering paper imported in sheets is valued over 75 cents per pound, and even under that suggestion, the provision in the Trade Agreement is practically nullified.

If filtering paper in sheets is dutiable as paper cut into designs or shapes, many provisions in the Tariff Act of 1930 designating *by name or by use* various papers which are commonly imported and used in sheets, would be nullified, such as ledger, bond and typewriter papers in paragraph 1407.

3. If Congress intended that the provision for papers cut into designs or shapes or other forms should reach out and invade all other paragraphs of the Act and gather within its provisions all paper cut into forms, Congress would have used a more intensified form of expression such as the all-inclusive language of Paragraphs 1529 and 1552 of the Act of 1930 or the proviso to Paragraph 31 of the Act of 1922, which read as follows:

> Par. 1529, Act 1930 (46 Stat. 665) * * * All the foregoing and fabrics and articles wholly or in part thereof, finished or unfinished * * * by whatever name known and to whatever use applied and whether or not named, described or provided for elsewhere in this Act * * *
>
> Par. 1552, Act 1930 (46 Stat. 671) * * * And all smokers' articles whatsoever and parts thereof, finished or unfinished, not specially provided for, of whatever material composed * * *
>
> Par. 31, Act 1922 (42 Stat. 863) * * * Provided, that all such articles (except photographic and moving picture films) whether or not more specifically provided for elsewhere, shall be dutiable under this Paragraph.

In paragraph 1402 of the Act of 1930, Congress has provided for a duty of 10% on paper board, pulpboard, cardboard and leather board or compress leather when not "cut into shapes for boxes or other articles", which materials are also provided for *eo nomine* in paragraph 1413 when "cut, die-cut, or stamped into designs or shapes".

> Par. 1402, Act of 1930 (46 Stat. 653) Paper board, wallboard, and pulpboard, including cardboard, and leather board or compress leather, not plate finished, supercalendered or friction calendered, laminated by means of an adhesive substance, coated, surface stained or dyed, lined or vat-lined, embossed, printed, decorated or ornamented in any manner, *not cut into shapes* for boxes or other articles and not specially

provided for, 10 per centum ad valorem * * * (Italics ours)

It is significant that the provision for filtering paper in the Trade Agreement contains no such limitation that filtering paper shall be "not cut into shapes".

If it was intended that filtering paper cut into circles, squares, rectangles or other shapes should be excluded from the Trade Agreement or from its predecessor paragraph 1409, Tariff Act 1930 (46 Stat. 657), some such words of limitation as "not cut into shapes" would have appeared in the filtering paper provisions.

4. "Filtering paper" is an *eo nomine* designation by *use* which prevails over a descriptive provision such as papers cut into designs or shapes, without special limitation as to use or other qualification. No principle is more firmly established in Customs adjudication.

Fink v. *U. S.*, 170 U. S. 584;
Magone v. *Wiederer*, 159 U. S. 555;
Magone v. *Heller*, 150 U. S. 70;
Cadwalader v. *Wanamaker*, 149 U. S. 532;
Chew Hing Lung v. *Wise*, 176 U. S. 156.

5. The doctrine of legislative approval of prior judicial construction applies because on January 6, 1911 (Abstract 24511, 20 Treasury Decisions 14) the Trial Court held filtering paper in circles dutiable as filtering paper and not as paper cut or stamped into designs or shapes under a similar provision in the Tariff Act of 1909, although the Appellate Court below (R. p. 42) held that the change from the word "paper" in the Act of 1909 to "papers" in the Act of 1930, indicates that the latter includes all papers excepting those specifically excluded, whereas we contend that the word "papers" is no more all-inclusive than the word "paper", just as the plural "men" is no more all-inclusive than the singular "man".

6. The provision for papers, cardboard, etc., cut into designs or shapes under which duty has been assessed, is qualified by the phrase "not specially provided for", which phrase, in effect, directs that articles provided for elsewhere *eo nomine* or by *use*, must be otherwise assessed.

> • • • The presence of the term "not specially provided for" in Par. 256, is of importance because it directs that if an article of wearing apparel is otherwise more specifically provided for, it must be otherwise assessed • • •
>
> *Proctor Co.* v. *U. S.*, 6 Ct. Cust. Appls. 119-120.

> • • • The provision for "cardboard, cut, die cut, or stamped into designs or shapes, such as initials, monograms, lace borders, or other forms," standing alone, we think, *should be restricted to papers or cardboard not specially provided for in other paragraphs.* (Italics ours.)
>
> *Kupfer Bros. Co.* v. *U. S.*, 7 Ct. Cust. Appls. 86, 88.

The Court below in the *Huber* case, *supra*, refused to apply this rule of Customs classification which would, the Court stated, make twenty-five kinds of paper *eo nomine* designated or described in the Tariff Act, not subject to the provisions of Par. 1413. In other words, the Appellate Court below, disregarding its former decisions without distinguishing them, held that papers cut into designs or shapes included papers provided for *eo nomine* or by *use* in other paragraphs of the Tariff Act.

7. The legislative history of the Tariff Act of 1930 shows that the House originally put filtering paper in a paragraph together with blotting paper, and Mr. Child of H. Reeve Angel and Co., the plaintiff herein, and Mr. Newton of the Eaton Dikeman Co., manufacturers of over 75% of the production of filtering papers in this country, appeared before the Committee on Finance of the Senate

on June 13th, 1929 and explained the necessity, as a matter of revenue to the Treasury and of protection to the American manufacturers, of the maintenance of the compound rates of duty rather than the single rate of 30% ad valorem which had been proposed by the House, and Congress in paragraph 1409 of the Act of 1930 restored the same *eo nomine* provision for filtering paper and the same compound rates of duty as were contained in the Tariff Act of 1922.

We append to this brief, for the convenience of the Court, the testimony of Mr. Child of Reeve Angel & Co., the plaintiff herein, and of Mr. Newton, representing the domestic filtering paper interests before the Committee on Finance of the Senate in 1929, from which it conclusively appears that the action of the Senate in restoring the rates and the language of the filtering paper paragraph in the Act of 1922, which later was approved by the Congress and became the Tariff Act of 1930, that filtering paper should be classified under the *eo nomine use* designation therefor and not under any of the other *descriptive* provisions of the Tariff Act, otherwise the action of Congress in striking out the rate of 30% which had been proposed by the House, would have been meaningless. Furthermore, from the description of the uses of filtering paper in this testimony and of the packing thereof in "that little box" mentioned in the testimony of Mr. Newton (Appendix, p. 20) it is clear that *circles* were in mind.

8. If filtering paper in circles is within the *letter* of the provision for paper cut into forms, it is not within the *spirit* thereof and therefore not within the Statute.

In *U. S.* v. *Aetna Explosives Co.* on certiorari, to the U. S. Court of Customs Appeals, the merchandise was nitric acid which was mixed with 20% of sulphuric acid in order to permit shipments in tank cars under rules of the Interstate Commerce Commission.

This Court refused to hold this mixture dutiable as a chemical mixture and affirmed the Court below, which held that although this constituted a mixture in the literal sense, because two chemical substances were mixed, it was not such a mixture as was contemplated by the Statute.

U. S. v. *Aetna Explosives Co.*, 256 U. S. 402.

In that case, the Court below cited with approval, the following rules of construction in Customs cases:

> This is a clear case for the application of the rule that a thing may be within the letter of a statute and yet not within the statute because not within its spirit nor within the intention of its makers. See Church of Holy Trinity v. United States (143 U. S. 457, 459; Heide v. United States (2 Ct. Cust. Appls. 399, 403; T. D. 32166).
>
> • • •
>
> It may be said that the case is not wholly free from doubt. It is well settled that in such case the construction of the statute most favorable to the importer is to be adopted. See Wright & Graham cases (6 Ct. Cust. Appls. 528; T. D. 36147) and cases cited.
>
> *Aetna Explosives Co.* v. *United States*, 9 Ct. Cust. Appls. 298, 306, 307.

Along this same line of thought is the expression of Judge De Vries of the Court of Customs Appeals in construing a similar provision for paper cut into forms or shapes in the Tariff Act of 1909 that a certain construction

> • • • "Renders its application here a matter of accident rather than of intent."
>
> *U. S.* v. *Fuld*, 4 Ct. Cust. Appls. 234, 239.

10. This case involves an important question of Federal Law, a Trade Agreement or Treaty with the United Kingdom and a Tariff Act passed by Congress which affects the rate and amount of Customs duties assessed upon filtering paper at all of the ports of entry in the United States, which should be settled by this Court.

CONCLUSION

This petition for a writ of certiorari should be granted.

FREDERICK W. BROOKS,
Attorney for Petitioner.

March, 1946.